

GEORGIA, BIBB COUNTY  
IN THE SUPERIOR COURT OF SAID COUNTY:

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*Dianne Drannen*  
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DIANNE DRANNEN, CLERK  
SUPERIOR COURT OF  
BIBB COUNTY GEORGIA

STATE OF GEORGIA : INDICTMENT #11CR67684  
:   
VS. : CHARGE: MURDER  
:   
STEPHEN MARK MCDANIEL, :   
DEFENDANT. :

**MEMORANDUM OF LAW SUPPORTING**  
**THE STATE'S MOTION TO INQUIRE**

COMES NOW, Gregory W. Winters, District Attorney, and Nancy Scott Malcor, Chief Assistant District Attorney in and for the Macon Judicial Circuit, and files this Memorandum of Law in reference to the State's Motion to Inquire into Assignment of Death Penalty Cases in *State v. Grable/Scott, State v. Walker, and State v. McDaniel*.

**I. Preliminary Matters**

The State's request for inquiry is not a motion to recuse Judge S. Phillip Brown under Uniform Superior Court Rule 25. The State has not, and does not presently, assert any bias or prejudice exists as to Judge Brown under Uniform Superior Court Rule 25.2. The State has not filed a motion to recuse and is not aware of any grounds or facts that would support recusal of Judge Brown in this case. Furthermore, this request for inquiry is not a motion to disqualify Judge Brown. Similarly, the State is not aware of any grounds for disqualification under O.C.G.A. § 15-1-8 and does not assert that any such reason for disqualification exists. The State requests inquiry as to the propriety of assignment in three different death penalty cases, *State v. Grable/Scott, State v. Walker, and State v. McDaniel*.

The State is in a delicate position in the prosecution of death penalty cases, as it must carefully protect the record against error made at any stage in the process of adjudication. "Death penalty cases *do* require closer examination." *Gibson v. Turpin*, 270 Ga. 855, 859 (1999).

As a result, several procedural and substantive safeguards are built into cases involving the death penalty. *See, e.g.*, O.C.G.A. § 17-10-30 (requirement of statutory aggravating factors); *Barnes v. State*, 269 Ga. App. 345, 358-60 (1998) (procedural allowance for mitigating evidence at sentencing); O.C.G.A. § 17-10-35 (required proportionality review of death penalty sentence). Moreover, the prevalence of habeas corpus proceedings that review death penalty convictions elevates the need for an extensive record of the trial court's operation.

As such, each decision rendered by the trial court requires vigilant observance for error by the parties involved, including the State. While the State does not doubt defense counsels' ability to address errors made in the process of case assignment, the State's role is unique in this system. The need for vigilance from the State comes from their "duty ... to seek justice, not merely to convict." *Burns v. State*, 172 Ga. App. 645, 647 (1984). *See also Rodriguez v. State*, 184 Ga. App. 819, 820 (1987) ("It has often been stated that it is the duty of a prosecuting attorney to see that justice is done and nothing more.").

The State has concerns that the assignment procedure laid out in the *Uniform Superior Court Rule 1.2(B) Order Regarding Rules of Assignment of Unified Appeal Cases and Case Assignment for the Superior Courts of the Macon Judicial Circuit* (Order)<sup>1</sup> was not followed in the assignment of *State v. Grable/Scott*, *State v. Walker*, and *State v. McDaniel*. This motion to inquire asks that this Court consider whether the dictate of the Order was followed by Chief Judge Brown and former Chief Judge Martha Christian in their assignment of these death penalty cases, and to take steps to remedy any errors made under the Order. The pure purpose of this inquiry is to prevent, or at least inform, future appellate and habeas corpus issues.

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<sup>1</sup> The *Uniform Superior Court Rule 1.2(B) Order Regarding Rules of Assignment of Unified Appeal Cases and Case Assignment for the Superior Courts of the Macon Judicial Circuit* (Order) is attached as Exhibit A.

## **II. Whether Chief Judge Brown should have reassigned *State v. Walker* following Judge Christian's retirement.**

The first inquiry by the State is whether the case of *State v. Walker* was still pending in the Macon Judicial Circuit at the time of Judge Christian's retirement, and accordingly, should have been reassigned when Judge Brown assumed the Chief Judge position on January 1, 2012. The Order of the Court governing assignments provided a system by which judges are assigned death penalty cases in the Macon Judicial Circuit. *See* Order at 3. "[T]he Chief Judge of the Macon Judicial Circuit will make a judge assignment for the Unified Appeal case on a rotating basis ... begin[ning] with the most senior judge and ... then rotat[ing] to the other active judges on the basis of seniority. If the next judge in sequence has an *active* Unified Appeal case at the time of the assignment, the chief judge may assign the next judge in sequence. If all judges have an *active* Unified Appeal case, then the assignment will fall to the most senior judge with the least number of *active* Unified Appeal cases." *Id.* (emphasis added).

The Order defines an "active case ... as a Unified Appeal case pending before the trial court at the time of the announcement from the State." A natural reading of the order includes those cases that are on appeal. Pending is defined as "[r]emaining undecided; awaiting decision." BLACK'S LAW DICTIONARY 1154 (7th ed. 1999). The *Walker* case does remain undecided before this Court, as the appellate issue has not yet been returned on remittitur, so there has been no opportunity to resolve *Walker* in the trial court.

The Order provides that "[a]ny Unified Appeal case pending when a judge ... vacates office ... shall be immediately reassigned to another judge according to this random assignment system." Order at 3. If *Walker* was pending before this Court at the time, Chief Judge Brown should have reassigned it at that time according to the random assignment system.

In Judge Brown's *Order on Assignment of Death Penalty Cases for State v. McDaniel*<sup>2</sup>, he ruled that, as to *Walker*, "[t]he appeal operates as a stay on trial court orders." However, an interlocutory appeal does not completely divest the trial court of jurisdiction, but only does so on those specific issues raised through the certification. *Southeastern Wholesale Furniture Co. v. Atlanta Metallic Casket Co.*, 84 Ga. App. 271, 274-76 (1951). The trial court loses "jurisdiction of the case insofar as it pertains to any and all issues raised by the bill of exceptions." *Id.* at 275.

There are instances where a trial court can take any number of actions while a case is on interlocutory appeal, and the court may go as far as "to conduct the actual trial of a case during the pendency of an interlocutory appeal from the denial of a motion to dismiss." *Argonaut Ins. Co. v. Atlantic Wood Industries, Inc.*, 187 Ga. App. 477, 479 (1988).

Indeed, the leading case in this area, *Southeastern Wholesale*, provides that "while the trial judge, after certifying the bill of exceptions, loses jurisdiction of every issue presented therein, the case is still pending in the trial court, and he may conduct interlocutory matters, allow pleadings, and proceed with the trial of the case, subject to the peril that any decision reached which conflicts with the decision of the appellate court when rendered will thereby be made nugatory." 84 Ga. App at 276.

While *Southeastern Wholesale* involved an interlocutory appeal on a general demurrer by the defense, there is no reason why the same logic could not include instances such as Lillian Walker's motion to dismiss based on failure to comply with speedy trial rights. Like a ruling on a general demurrer, Walker's motion involves a ruling that would be dispositive of the case if overruled on appeal, or have no bearing on the procession of the trial if denied on appeal. Consequently, the *Argonaut Ins.* concept that the trial could actually be conducted during the pendency of the interlocutory appeal would apply equally in this instance—there is nothing to be

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<sup>2</sup> The *Order on Assignment of Death Penalty Cases for State v. McDaniel* is attached as Exhibit B.

gained by a delay other than avoidance of “the peril that any decision reached which conflicts ... will thereby be made nugatory.” *Id.*

O.C.G.A. § 5-6-34, in fact, implicitly recognizes that trial courts may continue to make “judgments, rulings, or orders” with the caveat that such actions “erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous.” O.C.G.A. § 5-6-34(d). Simply put, an overturned decision on appeal does not necessarily render all actions taken by the trial court nugatory, but only those actions that were taken after the certification was made and conflict with the establishment of error. *Id.* In fact, the statute directly contemplates “judgments, rulings, or orders ... rendered subsequent to the first judgment, ruling, or order held erroneous.” *Id.*

Chief Judge Brown’s articulation of the standard, noted in his January 25, 2012 letter<sup>3</sup>, is that “[a] judge can enter an order in a case on appeal only if the order is not germane to the issue on appeal.” That calculation appears to miss the nuance of *Southeastern Wholesale*: while the trial court is divested of jurisdiction on those issues raised on appeal, the court does not lose the authority to make judgments, rulings, or orders on the case with the knowledge that those actions may be rendered null following the appellate court’s decision. 84 Ga. App. at 276. Both *Southeastern Wholesale* and *Argonaut Ins.* convey this principle, and the plain language of O.C.G.A. § 5-6-34(d) confirms it.

In his correspondence, Chief Judge Brown has also cited *Chambers v. State*, 262 Ga. 200 (1992), to support his finding that “the pending appeal in [*Walker*] stays any order from the trial

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<sup>3</sup> Judge Brown’s January 25, 2012 letter is attached as Exhibit C.

court.” Letter to Joseph Baden (February 6, 2012) at 2.<sup>4</sup> In relevant part, *Chambers* provides that a trial court does not have “jurisdiction to take any action in a case prior to receiving the remittitur from the appellate court.” 262 Ga. at 200. The case in *Chambers*, and its progeny, are distinguishable from the prospect of assigning a judge to the *Walker* matter.

In *Chambers*, the Georgia Court of Appeals reversed a trial court’s decision to suppress, and prior to remittitur, the trial court tried and convicted the defendant. *Id.* at 201. However, the Georgia Supreme Court ruled that the conviction was “nugatory” because the remittitur had not returned—in essence, the proceeding could not be had in the trial court because the trial court’s granted motion to suppress had not yet been overturned. *Id.* at 201 n.2. Subsequent rulings by the Georgia Supreme Court have restated the *Chambers* rule, that “[a] notice of appeal divests the trial court of jurisdiction *to alter judgment* while an appeal of that judgment is pending.”

*McCulley v. State*, 273 Ga. 40, 43 (2000) (emphasis added). The distinction is important, in that the *Chambers* case altered the judgment on the motion to suppress before the remitter had returned, which was improper because the trial court did not have jurisdiction over that issue. *See Chambers*, 262 Ga. at 201.

The *Walker* appeal relates to a motion to dismiss on the grounds of a statutory speedy trial violation. The judgment entered in that case on the denied motion to dismiss would not need to be altered in order to assign a judge to that case. Accordingly, application of the *Chambers* bar on trial court orders would be inappropriate and contrary to the findings of *Southeastern Wholesale* and *Argonaut Ins.*, as those cases did not involve alterations of the judgment either. As this Court does not lose jurisdiction over the *Walker* case while it is on appeal, the Order provides that it is an active case that should have been reassigned after Judge Christian’s retirement on January 1, 2012.

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<sup>4</sup> Letter to Joseph Baden attached as Exhibit D.

**III. If the trial court does not count *Walker* towards case assignment due to its appeal, Chief Judge Christian improperly assigned *Grable/Scott*.**

If the Court finds that *Walker* should not be assigned while on appeal, following the reasoning of Judge Brown, the State is concerned that Judge Christian, Chief Judge at the time, improperly assigned *State v. Grable/Scott* to Judge Simms under the Order on October 12, 2011. On October 12, 2011, when Judge Christian assigned *Grable/Scott* to Judge Howard Simms, the judges in the Macon Judicial Circuit had the following death penalty assignments (assuming no jurisdiction over *Walker*):

- Chief Judge Christian:
- Judge Brown: *State v. Pope*, *State v. Braswell* (death penalty removed 10/27/11)
- Judge Self: *State v. Fair/Jolly*
- Judge Ennis: *State v. Battle*
- Judge Simms: *State v. Grable/Scott*

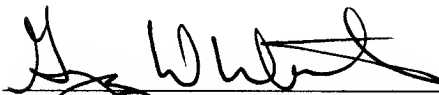
Under the Order, Chief Judge Christian should have assigned *Grable/Scott* to herself. “The rotation shall begin with the most senior judge and shall then rotate to the other active judges on the basis of seniority.” Order at 3. As the most senior judge, Chief Judge Christian would be the appropriate assignee where she did not have an active death penalty case.

*Walker* was docketed with the Georgia Supreme Court as an appealed case on June 2, 2011. Assuming Judge Brown’s reasoning is correct, Chief Judge Christian did not assign *Grable/Scott* to the most senior judge without a death penalty case. *See* Order at 3. If the Court determines that no jurisdiction is had over *Walker* (and thus it cannot be counted towards assignment), *Grable/Scott* was improperly assigned to Judge Simms under the rules for assignment laid forth in the Order.

#### IV. Conclusion

As offered before, the State's position is delicate, in that, the assignability of *Walker*, despite its status on appeal, affects the assignments in *Grable/Scott*, *Walker*, and *McDaniel*. Should the Court agree with the reasoning of Judge Brown, as may be appropriate, Judge Christian improperly assigned *Grable/Scott* to Judge Simms in October 2011. Were the Court to find *Walker* assignable, as suggested *supra*, Judge Brown's Order on Assignment of Death Penalty Cases on *McDaniel* would have been issued prematurely, before the necessary assignment of *Walker*. The purpose of this inquiry is to ascertain the Court's position as to how the *Walker* case should be treated while on appeal under the Order and how the above-mentioned cases should be assigned.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of March, 2012.



Gregory W. Winters  
District Attorney  
Macon Judicial Circuit  
Georgia Bar No. 771084



Nancy Scott Malcor  
Chief Assistant District Attorney  
Macon Judicial Circuit  
Georgia Bar No. 46073



**CERTIFICATE OF SERVICE**

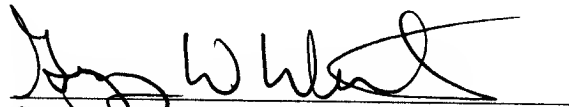
I, Gregory W. Winters, District Attorney in and for the Macon Judicial Circuit, do hereby certify that I have this day served a true and correct copy of the within and foregoing

**MEMORANDUM OF LAW SUPPORTING THE STATE'S MOTION TO INQUIRE** upon the Defendant's counsel by mailing the same to:

Floyd M. Buford, Jr.  
136 College Street  
P.O. Box 4747  
Macon, Georgia 31208

Franklin J. Hogue  
341 Third Street  
P.O. Box 1795  
Macon, Georgia 31202

This 21<sup>st</sup> day of March, 2012.

A handwritten signature in black ink, appearing to read 'Gregory W. Winters', is written over a horizontal line.

Gregory W. Winters  
District Attorney  
Macon Judicial Circuit  
Georgia Bar No. 771084

misc # 131

Vicki Autley

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DIANNE BARNES, CLERK  
SUPERIOR COURT OF  
BIBB COUNTY, GEORGIA

STATE OF GEORGIA

MACON JUDICIAL CIRCUIT

UNIFORM SUPERIOR COURT RULE 1.2(B) ORDER REGARDING RULES OF  
ASSIGNMENT OF UNIFIED APPEAL CASES AND CASE ASSIGNMENT FOR THE  
SUPERIOR COURTS OF THE MACON JUDICIAL CIRCUIT

Under the authority granted in Uniform Superior Court Rules (U.S.C.R.) #.1 for the "assignment of cases and actions" and U.S.C.R. 1.2 (B) for "Standing Orders" the following Rules regarding assignment of Unified Appeal cases is hereby promulgated by a majority of the Judges of Circuit, effective January 1, 2011, for the Superior Courts of the Macon Judicial Circuit. The Rules are specifically inclusive of and subject to the Uniform Superior Court Rules adopted by the Supreme Court of Georgia and effective July 1, 1985, as amended. These Rules set forth the well-established practices of the Court relating to case management, administration, and the operation of the Court and govern the programs which relate to case management, administration, and operation of the Court. These Rules also include an articulation of the particular procedure followed by the Court pertaining to the assignment of Unified Appeal cases pursuant to U.S.C.R. 3.1, which was adopted unanimously by all the Judges of the Circuit.

1. For identification and operational purposes, there are designated the following divisions of the Macon Judicial Circuit:
  - a) One-half Bibb Civil Jury Proceedings;

- b) One-half Bibb Civil Jury Proceedings;
- c) Bibb Domestic Relations Jury Proceedings;
- d) Bibb Major Criminal Jury Proceedings;
- e) Bibb Drug Court and Criminal Drug Case Jury Proceedings;
- f) Bibb Criminal Accusations Jury Proceedings;
- g) Peach Civil Jury Proceedings;
- h) Peach Criminal Jury Proceedings;
- i) Crawford Civil Jury Proceedings;
- j) Crawford Criminal Jury Proceedings;
- k) Habeas Corpus Proceedings.

Bibb County Civil Jury Proceedings shall be assigned by the Clerk of the Superior Court of Bibb County on a random basis by computer program so as to assign cases on a 50/50 basis annually to the Judges designated under subparagraphs a and b above.

Judges of each division shall be assigned on an annual basis by the Chief Judge after consultation with the other Judges of the Macon Judicial Circuit.

2. Presiding Judge:

The presiding judge for Bibb County will be set by an annual calendar promulgated by the Chief Judge. The presiding judge for Peach and Crawford will be the judge designated for Civil Jury Proceedings in each county respectively.

3. Assignment of Unified Appeal Cases

Upon filing of the State's Notice of Intent to Seek the Death Penalty, and regardless of the judge to which the case is assigned at the time of the Notice, and

regardless of the county in which the death penalty is being sought, the Chief Judge of the Macon Judicial Circuit will make a judge assignment for the Unified Appeal case on a rotating basis, from among all active judges of the Macon Judicial Circuit. The rotation shall begin with the most senior judge and shall then rotate to the other active judges on the basis of seniority.

If the next judge in sequence has an active Unified Appeal case at the time of the assignment, the chief judge may assign the next judge in sequence. If all judges have an active Unified Appeal case, then the assignment will fall to the most senior judge with the least number of active Unified Appeal cases. The chief judge will discuss a pending assignment with the prospective case judge and in the absence of a conflict, the chief judge will enter a transfer/assignment order. If the prospective case judge has a basis for recusal or a conflict, the next judge in sequence will be eligible for the assignment.


In the event that a prospective judge cannot accept an assignment because of recusal or conflict, or in the event that judge is not assigned the case because he/she has an active case, that judge will receive a bye in the rotation and will be assigned the next Unified appeal case.


An active case shall be defined as a Unified Appeal case pending before the trial court at the time of the announcement from the State.

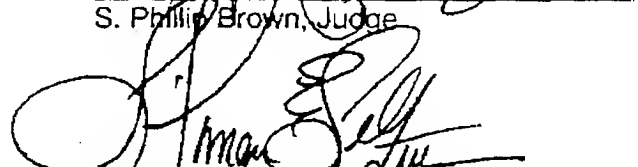
Any Unified Appeal case pending when a judge completes his/her term without being reelected, vacates office, or becomes disqualified or otherwise incapacitated, shall be immediately reassigned to another judge according to this random assignment system.

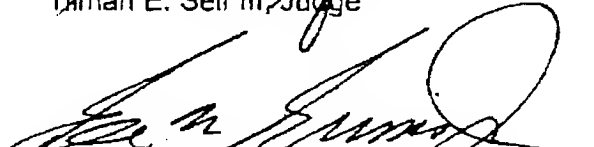
The foregoing Rules having been adopted by the undersigned Judges of the  
Macon Judicial Circuit,

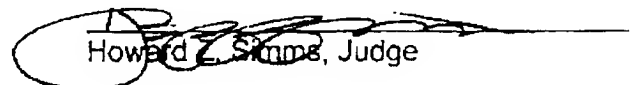
This 4<sup>th</sup> day of January, 2011.

  
Martha C. Christian, Chief Judge

  
S. Phillip Brown, Judge

  
Tilman E. Self III, Judge

  
Edgar W. Ennis, Jr., Judge

  
Howard L. Simms, Judge

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

THE STATE OF GEORGIA,

vs.

STEPHEN MARK MCDANIEL,

Defendant

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: CASE NO. 2011-CR-067684  
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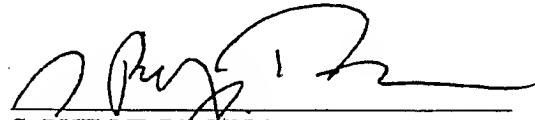
ORDER ON ASSIGNMENT OF DEATH PENALTY CASES

Under rules of this Judicial Circuit for assignment of cases in which the State has announced its intention to seek the death penalty, and on account of the rotation on prior cases assigned, and on account of Judge Edgar W. Ennis having recused to handle the State of Georgia vs. Stephen McDaniel case.


The case of State of Georgia vs. Stephen Mark McDaniel, is assigned to the undersigned Judge S. Phillip Brown for disposition.

The State vs. Lillian Walker, Peach County, Georgia is on appeal to the Georgia Supreme Court. The appeal operates as a stay on trial court orders. The Walker case will be assigned when the appeal is final.

So ordered this 4<sup>th</sup> day of January, 2012.

  
S. PHILLIP BROWN  
Chief Judge, Superior Courts of Georgia  
Macon Judicial Circuit

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2012 JAN -4 AM 9:36  
  
DIANNE BRANNEN, CLERK  
SUPERIOR COURT OF  
BIBB COUNTY GEORGIA



**CHAMBERS OF THE SUPERIOR COURTS**  
MACON JUDICIAL CIRCUIT  
601 MULBERRY STREET  
SUITE 310  
MACON, GEORGIA 31201

**S. PHILLIP BROWN**  
CHIEF JUDGE

(478) 621-6328  
Fax (478) 621-6580

January 25, 2012

Greg Winters, Esq.  
District Attorney  
661 Mulberry Street  
Macon, GA 31201

RE: State of Georgia vs. Stephen Mark McDaniel

Dear Greg:

Regarding the assignment issue on McDaniel, I hope I gave enough of an explanation with my mail of Monday. The logic and research behind my assignment was actually quite a bit more complex. Some highlights here. I see no reason to put all logic down. I am not even sure I would recall all the rationale at any one sitting.

I actually spent an entire weekend dealing with this issue. I ran every possibility of assignment through my mind numerous times, in order to investigate possibilities. It dawned on me this morning that you may have had some other reason than the one I explained Monday for your thoughts. Let me add this to the rationale used.

I want to keep this short. I avoided some of the reasons because the entire logical stream is not short

Here is an important addition to what I previously wrote. I assumed when I wrote that what I wrote would be sufficient. It may not have been.

Under the rule we are to bypass (give a bye to) a judge for assignment if they already have more cases than others later in the assignment rotation.

The rotation order is from most senior judge to successive less senior, as of date of indictment. That rotation is therefore in this order: me, Judge Self, Judge Ennis then Judge Simms, and then back to me.

All judges already have two cases except Judge Ennis and me. That seems to have limited this assignment to either Judge Ennis or to me. I went to judge Ennis to see if he would be a possibility to assign the McDaniel case to. He informed me that he had recused (or would have to recuse, if he had not already recused) due to fact that the defendant had been his legal intern. That left me as the only judge with only one case that could take this assignment under the rules.

I followed the order of rotation around in circles and it always landed back on me. Judge Self had the problem of having repeatedly found probable cause for arrest and search after talking to (taking sworn testimony from) investigators and this when there was no case pending; Judge Ennis recused on account of knowing defendant; Judge Simms already had two cases and I had only one, so the rotation pointer came back to me.

If the defense has any objection we will hear them out. I want you to know enough of my logic to see what I did and why so.

I am at home writing. I assume that I explained not assigning the Peach County case to me before assigning McDaniel. Doing so would have the assignment pointer stop with Judge Simms. Yet research on that showed that I could not enter an order of assignment of the Walker case in Peach County due to the pendency of an appeal on an issue that will determine if a case is pending against Walker. I cannot assign a case (Walker) if it does not exist. The appeal will decide that issue.


A judge can enter an order in a case on appeal only if the order is not germane to the issue on appeal. For example they allow an order to issue on child support contempt despite the issue of a divorce being on appeal. Yet in Walker the very same issue on appeal is an innate aspect of any assignment, namely whether or not there is any case existing to be assigned.

Assigning the Walker case would effectively give a bye to one judge in rotation in contradiction to our assignment rule, if there is no pending case in Peach.

That would also put three cases on Judge Simms with me having only one. That too is contrary to our rule. The rule says we pass over a judge with more cases assigned than the judges further in rotation cycle. (i.e. pass over Simms who has two cases and get to me, with only one – so as to avoid Simms with three and me with one).

If you have a better idea, please share it. I just think you need to know my logical flow in reaching my decision.

Respectfully,



Phil Brown

Cc: Floyd Buford  
Franklin J. Hogue





**CHAMBERS OF THE SUPERIOR COURTS**

MACON JUDICIAL CIRCUIT  
601 MULBERRY STREET  
SUITE 310  
MACON, GEORGIA 31201

**S. PHILLIP BROWN**  
CHIEF JUDGE

(478) 621-6328  
Fax (478) 621-6580

February 6, 2012

Joseph D. Baden  
District Court Administrator  
124 Byrd Way, Suite 300  
Warner Robins, GA 31095

RE: State of Georgia v. Stephen Mark McDaniel, 11-CR-67684, Bibb County  
State of Georgia v. Lillian Walker, 09-CR-119, Peach County

Dear Mr. Baden:

I am writing you today because District Attorney Gregory Winters recently filed virtually identical "Motion[s] to Inquire into Assignment of Death Penalty Case[s]" in both of the above-referenced death penalty cases. I assigned McDaniel, which is a Bibb County case, to myself. However, I have not yet assigned Walker, which is a Peach County case, because there is an appeal pending before the Georgia Supreme Court. As I understand it, the Georgia Supreme Court is reviewing a potentially dispositive ruling in Walker made by Judge Christian. She denied defendant's motion for an acquittal.

After reviewing the "Motion to Inquire into Assignment of Death Penalty Case" in both McDaniel and Walker and after consulting with other local judges, I respectfully request that you to appoint a chief judge from another circuit to resolve both motions.

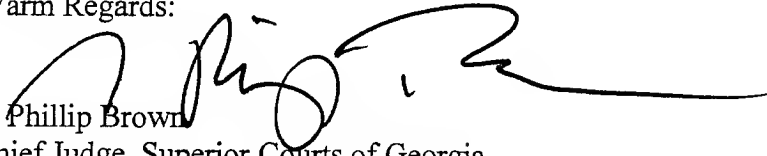
The relevant facts that a reviewing judge likely will need to know in order to analyze the assignment rules of the Macon Judicial Circuit as those rules apply here are set forth below:


1. On January 4, 2011, the judges of the Macon Judicial Circuit enacted a local standing order formalizing our longstanding internal practices for, among other things, the assignment of unified appeal or death penalty cases. For ease of reference, the January 4, 2011 local standing order is attached and labeled "Exhibit A."

2. As per the January 4, 2011 local standing order, once the State files its Notice of Intent to Seek the Death Penalty, the Chief Judge of the Macon Judicial Circuit is to assign a judge on a rotating basis among all active judges. The rotation order for the assignment of death penalty cases begins with the most senior judge and rotates thereafter based on judge seniority. The current rotation order and number of death penalty cases presently assigned to each active judge in the Macon Judicial Circuit is as follows:
  - a. S. Phillip Brown 2 active cases (including McDaniel)
  - b. Tilman E. Self 2 active cases (involving codefendants)
  - c. Edgar W. Ennis 1 active case
  - d. Howard Z. Simms 2 active cases (involving codefendants)
3. Judge Simms had the most recent assignment of a death penalty case. He was assigned two death penalty cases involving codefendants.
4. When Judge Christian retired effective January 1, 2012 and assumed senior judge status, she was handling the following two death penalty cases:
  - a. Walker, which is an older Peach County case currently on appeal, and
  - b. McDaniel, which is a more recent Bibb County case.
5. After Judge Christian retired, I became the Chief Judge of the Macon Judicial Circuit. It therefore is my responsibility as Chief Judge to assign both Walker and McDaniel, consistent with the existing law and the above-referenced local standing order.
6. Because Judge Simms received the most recent death penalty case assignment, I was the next judge for the assignment of a death penalty case in the current rotation order.
7. Walker is presently on appeal to the Georgia Supreme Court. For that reason, I did not assign any judge to Walker. Pending appeals stay orders per the law discussed *infra*. Instead, I assigned McDaniel, pursuant to an "Order on Assignment of Death Penalty Cases" filed in the Clerk's Office on January 4, 2012. For ease of reference, the January 4, 2012, "Order on Assignment of Death Penalty Cases" is attached and labeled "Exhibit B."
8. In assigning myself to McDaniel, I relied on:
  - a. My interpretation of the January 4, 2011 local standing order; and
  - b. Certain statutory and case law indicating that the pending appeal in Walker stays any order from the trial court. See Chambers v. State, 262 Ga. 200, 200-201 (1992); O.C.G.A. § 5-6-34(b).
9. For ease of reference, the District Attorney's January 26, 2012 "Motion to Inquire into Assignment of Death Penalty Case" in McDaniel is attached and labeled "Exhibit C."

Please do not hesitate to contact me with any questions or concerns. Thank you in advance for your assistance in this matter.

Warm Regards:

  
S. Phillip Brown  
Chief Judge, Superior Courts of Georgia  
Macon Judicial Circuit

cc: Floyd M. Buford, Jr., Franklin J. Hogue,  Gregory W. Winters  
TES, EWE, HZS, MCC, TDW  
Clerk